No. 11,532.

IN THE

nited States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EODORE S. GAGE,

Appellant,

vs.

ITED STATES OF AMERICA,

Appellee.

PPELLANT'S PETITION FOR REHEARING.

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THEODORE S. GAGE,

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable Judges of the Ninth Circuit Court of Appeals:

Appellant, Theodore S. Gage, respectfully petitions the Honorable Court for a rehearing of the within appeal upon the following grounds:

1. The Court's written opinion affirmatively shows that it inadvertently overlooked the fact that the exhibit referred to in the opinion expressly indicates that appellant stated that Tomsone was endeavoring to bribe him.

2. Further consideration should be given to the misstatement of the prosecuting attorney to the jury, since it goes to the very heart of appellant's defense, and must have finally determined the jury's verdict.

3. The rejection of the evidence of convictions for theft of Hubert Tomsone and the testimony of Fred Skill should be reconsidered, since they were properly presented, were legally admissible, and in view of the peculiar facts of this case would have substantially affected the jury's verdict.

ARGUMENT.

I.

The Court's Written Opinion Affirmatively Shows That It Inadvertently Overlooked the Fact That the Exhibit Referred to in the Opinion Expressly Indicates That Appellant Stated That Tomsone Was Endeavoring to Bribe Him.

On page 4 of its Opinion, the Honorable Court in referring to the exhibit submitted upon the Motion for a New Trial containing the telephone conversation between Joseph J. Cummins, appellant's attorney, and several of the doctors at the Veterans' Administration, states: "Nothing in the exhibits indicates that appellant had at any time stated that Tomsone was endeavoring to bribe him." This statement indicates that the Honorable Court inadvertently overlooked the following portions of said exhibit:

A. Portion of conversation between Joseph J. Cummins and Dr. M. J. Hurst:

> "JJC. Uh-huh. Did he ever tell you that he was trying to get Tomsone; that he felt that Tomsone was paying somebody off and he was trying to get him?
>
> Dr. H. Yes, uh-huh." [Tr. p. 54.]

B. Portions of conversation between Joseph J. Cummins and Dr. Colonel Strayder:

> "JJC. Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?
>
> Dr. S. Well, he didn't know.

JJC. He told me he told *you* that prior to his arrest.

Dr. S. He might have mentioned it to me." [Tr. p. 49.]

Since this newly discovered evidence concerns appellant's basic defense (*People v. Skaggs,* 80 A. C. A. 93), and if presented to the jury could materially have affected the jury's verdict, we respectfully request the Honorable Court to reconsider the same upon rehearing.

II.

Further Consideration Should Be Given to the Misstatement of the Prosecuting Attorney to the Jury, Since It Goes to the Very Heart of Appellant's Defense, and Must Have Finally Determined the Jury's Verdict.

It is undisputed that the only evidence in the case as to the length of time elapsing between appellant's return to his office after accepting the money and his apprehension by agents of the Federal Bureau of Investigation was not more than a couple of minutes. It is further undisputed, and admitted by the prosecuting attorney, that the statement to the jury that appellant remained in his office for fifteen minutes after accepting said money was inadvertent error. In view of the fact that the theory of the defense was and is that appellant had accepted the money with the intention of turning it over to his superiors and thus entrapping Tomsone, the Government's chief witness, this error strikes at the very basis of appellant's defense without any support in the evidence.

Since the prosecuting attorney himself made such admitted inadvertent error in disregard of the sworn testimony, can it be said that the jury, who are untrained in legal procedure and analysis of evidence, in spite of their intelligence, can be assumed not to have made the same error as the prosecuting attorney? If the jury accepted the prosecuting attorney's statement, as we submit it must have done to arrive at its verdict under the remaining facts of the case at bar, the same so seriously injured appellant as to deny him a fair trial.

In view of the foregoing, it is respectfully submitted that the same should be reconsidered by this Honorable Court and a redetermination made as to whether the same comes within *Rule 52(b), Rules of Criminal Procedure,* and the cases of *Edgmon v. United States,* 87 F. (2d) 13; *Meadows v. United States,* 82 F. (2d) 881; *Lindsey v. United States,* 133 F. (2d) 368; *Thomas v. District of Columbia,* 90 F. (2d) 424, which permit the Appellate Court to take notice of such error in the absence of objection or assignment thereof.

III.

The Rejection of the Evidence of Convictions for Theft of Hubert Tomsone, and the Testimony of Fred Skill Should Be Reconsidered, Since They Were Properly Presented, Were Legally Admissible, and in View of the Peculiar Facts of This Case Would Have Substantially Affected the Jury's Verdict.

It should be recalled that the conviction in this case is based almost solely upon the testimony of said Hubert Tomsone, and that said testimony consisted entirely of conversations had between said Tomsone and appellant at which no other persons were present. Under such circumstances the character, credibility and veracity of said Hubert Tomsone were vital. The submission of such impeaching evidence to the jury under such circumstances could not help but greatly affect their verdict.

A. The evidence of the two convictions for theft of the said Hubert Tomsone was properly and legally presented. The Court will recall that during the argument of this appeal before the Honorable Court, Joseph J. Cummins, one of the counsel for appellant, stated to the Court that the officials of the Long Beach Jail refused to permit him to obtain certified copies of such records without court order; that said Joseph J. Cummins, upon the hearing of the Motion for New Trial, and in the presence of the prosecuting attorney, requested the Honorable Trial Judge, Peirson M. Hall, for such an order, but that the same was refused by said trial judge; that the prosecuting attorney verified the foregoing to this Honorable Court

at said time and place. Appellant therefore made the best and fullest presentation of said records as was possible.

B. The fact that the affidavit does not indicate whether said convictions were for felonies or misdemeanors is immaterial. The affidavit specifically indicates that the same were for theft, which clearly is a crime involving moral turpitude. Under the new Federal Rules of Criminal Procedure it is expressly provided that in criminal cases, as distinguished from civil cases, the state law regarding admissibility of evidence shall not be applicable, but that the general Federal Rules shall apply. Rule 26 of the Federal Rules of Criminal Procedure provides:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The Advisory Committee Notes to this rule state:

> "2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a)), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal juris-

diction is based on diversity of citizenship the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another."

Under the Federal Rule the record of a conviction of crime is admissible for the purpose of attacking the credibility of a witness if the conviction is a felony, an infamous crime or a *crime involving moral turpitude.*

Pittman v. United States, 42 F. (2d) 793, 795.

Clearly, the admissibility of a record of conviction of crime under the Federal Rule is not limited to felonies; clearly, the crime of theft is one involving moral turpitude.

It is respectfully submitted, therefore, that a rehearing should be granted herein.

Respectfully submitted,

Joseph J. Cummins and
David H. Paltun,
Attorneys for Appellant.

Certificate of Counsel.

David H. Paltun, one of the counsel for appellant, hereby certify that the petition for rehearing herein is filed in good faith, and believe the points raised are meritorious and not for purposes of delay.

DAVID H. PALTUN.